88-1038

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DIKRAN BERBERIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS FOR REVIEW

I. WHETHER THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (**JACKSON V. VIRGINIA**, 443 U.S. 307 (1979)).

II. WHETHER THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL.

III. WHETHER THE FILING OF A WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Dikran Berberian, requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **United States v. Dikran Berberian**, No. 86-5073.

OPINION BELOW

The Opinion of the Court of Appeals affirmed the conviction and sentence of petitioner and is officially reported at 851 F.2d 236 (9th Cir. 1988). A copy of the

Opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 28 June 1988 the Court of Appeals entered judgment affirming the conviction of the petitioner for conspiracy and aiding and abetting the interstate transportation of explosive materials and aiding and abetting such transportation (18 U.S.C. 371, 2, and 844(d)). On 2 November 1988 this Petition for Rehearing and Suggestion for Rehearing En Banc was denied (Appendix B). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

STATUTE INVOLVED

The petitioner was convicted of the conspiracy and substantive offense that were in violation of 18 U.S.C. 844(d):

> Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual

> or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both. . . .

STATEMENT OF THE CASE

After a federal jury trial, the petitioner was convicted of the conspiracy and aiding and abetting the interstate transportation of explosives (18 U.S.C. 371, 2, 844(d)), but acquitted of the possession of the improvised explosive device (26 U.S.C. 5861(d)). The defendant received consecutive sentences and is serving them at the Federal Correctional Institution, Terminal Island, California. The federal district court had jurisdiction of these federal criminal offenses. 18 U.S.C. 3231.

SUPPLEMENTAL STATEMENT OF FACTS[1]

[1] The Court of Appeals Opinion provides a brief summary of the facts (Appendix A, 3-4), but an amplification of the facts is necessary in order for this Court to evaluate the application of the "slight evidence rule."

From 20 September through 22 October 1982, Co-defendants Hovsepian, Yacoubian, Sarkissian, and Dadaian planned to blow up the office of the Honorary Turkish Counsel which was located on the fifth floor of the Smylie Building in Philadelphia, Pennsylvania (1 RT 105, 115-116). Their plans, discussed in Armenian with some code names (i.e., "Hratch's son" (2 RT 132)), were discovered by a FISA wiretap on Hovsepian's phone, and the transcripts of 27 conversations[2] during this time period were introduced in evidence (1 RT 83-86; GX 2A-2AA).

On 22 October 1982 Dadaian flew to Boston where he was arrested. In his suitcase there was an improvised explosive device consisting of a timing device attached to a wooden block, a blasting cap, and five sticks of dynamite

[2] Hovsepian, Yacoubian, and Sarkissian were participants in eleven of these calls which were related to the flight of Dadaian with the explosive device to Boston and occurred from 11:42 p.m. 21 October 1982 to 5:54 p.m. 22 October 1982 (2 RT 254-282; GX 2P-2AA). None of these calls involved Berberian or contained references to him.

(the explosives and the timing device were in the same suitcase but all separated)(2 RT 241, 295-297). Also found in Dadaian's suitcase was a circuit tester (2 RT 296, 345).

On 30 September 1982, petitioner in a telephone conversation with Hovsepian, arranged to meet with him at a cafe in Westwood (Los Angeles) (2 RT 123-127). On 6 October 1982, petitioner and Hovsepian had a telephone conversation in which Hovsepian asked petitioner to meet him in front of his house at 8:30 (2 RT 134-135). In the afternoon of 17 October 1982, petitioner and Hovsepian spoke on the phone about Hovsepian's return, and Hovsepian suggested a meeting the following day at "number one" and says that he has "good news" (2 RT 139-140). Later that evening, Hovsepian left a brief message on petitioner's answering machine that they were to meet at "number two" (2 RT 141).

On 21 October 1982 FBI surveillance

observed petitioner make the following purchases: three or four white plastic wire ties, two Duracell 9-volt transistor batteries, and H-block made of wood, four grey wire nuts, a roll of solder, a circuit tester (2 RT 150-151), a toggle switch (2 RT 152), a single edged razor blade, a bag of six or eight grey colored screws (2 RT 172), a Timex watch (2 RT 178-188), and a bag of 3/4" silver screws (2 RT 218).

The H-block of wood was from the same cut as a sample purchased by the FBI at the store where petitioner purchased his (3 RT 8-9). The Timex watch was the same catalog number and year of manufacture (3 RT 347), but the word "Timex" on the watch on the device was not on the sample (2 RT 198, 3 RT 5). The wirenuts on the device appeared to be the same as a sample purchased by the FBI (2 RT 346-347). The circuit tester found in Dadaian's suitcase appeared the same as the purchased sample (2

RT 346).

During this day of surveillance at approximately 1:15, petitioner left his residence carrying something toward the parking area and returned without it (2 RT 219).

Codefendant Dadaian testified that petitioner was at the White Oak Armenian Church at the time he packed the timing device, the blasting cap and the dynamite in the suitcase (2 RT 241-242). Dadaian found the device at the preschool in the back of the Church area where Hovsepian had told him it was left (2 RT 251). Dadaian denied anyone was with him at the time he packed the explosive device in the suitcase (2 RT 243, 251). Petitioner and codefendant Yacoubian were at the Church but outside (2 RT 247). Dadaian testified there never was a time when he met with his co-conspirators that petitioner was present to discuss their plans (2 RT 250). Petitioner did not give him the device nor tell him where it

might be (2 RT 250-251).

On 21 October 1982 before going to the White Oak Armenian Church, petitioner began circling the blocks to check for a tail, which the FBI agent characterized as "dry cleaning" (2 RT 228). When petitioner arrived home that evening around 9:25, he parked and walked to the sidewalk and checked up and down the street. About five minutes later he drove out of the complex and made a u-turn and returned home, and 45 minutes later he drove and circled the neighborhood looking for possible surveillance units (2 RT 230-231).

During their surveillance of petitioner on 21 October 1982 and after the first purchase of items (10:47 a.m.), the FBI saw petitioner arrive at his house and later leave for a shopping area in a car driven by an unknown person (1 RT 34, 2 RT 155-156, 204). At 2:20 p.m., petitioner in his car, picked up an unknown individual in a plaid shirt and they

drove with intermittent stops to the Armenian School on Beverly Road in Pico Rivera where he arrived about 3:10 p.m. (2 RT 156-157, 225). At 6:23 p.m., petitioner was seen to leave the Armenian School with an unidentified white male whom he dropped off on his way to the Armenian Church on White Oak (2 RT 226-228).

REASONS FOR ALLOWANCE OF THE WRIT

I. THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (JACKSON V. VIRGINIA, 443 U.S. 307 (1979)) AND CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUITS.

In affirming the first direct review of the petitioner's conviction, the Court of Appeals below stated:

> "Once existence of a conspiracy has been established, evidence of only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation in it (citations)" **United States v. Berberian**, 851 F.2d. 236, 238 (9th Cir. 1988) (Appendix A).

This standard of review conflicts with the requirement that every element, including defendant's nexus with the conspiracy, be established by proof beyond a reasonable doubt. This Court has held:

> "Lest there be any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **In re Winship**, 397 U.S. 358, 364 (1970) (emphasis added).

This Court in review of the federal criminal conviction has a well-established tradition that there must at least be substantial evidence taking the view most favorable to the Government to support it. **Glasser v. United States**, 315 U.S. 60, 80 (1942), **Hamling v. United States**, 418 U.S. 87, 124 (1974).

In **Jackson v. Virginia**, 443 U.S. 307 (1979), in the federal habeas corpus review of

the sufficiency of evidence in a state criminal case, this Court indicated that standard of review was evidence to support the finding of guilt beyond a reasonable doubt:

> "After **Winship** the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. 307, 318.

The court stated that it could not be seriously argued that a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. 443 U.S. 307, 320.[3] In **Bose Corp v. Consumer's Union of U.S., Inc.**, 466 U.S. 485, 506-507 (1984), this Court

[3] Recently this Court has expanded the admissibility of co-conspirator statements that are presented to the trier of fact by permitting their use without a showing of unavailability of the witness (**United States v. Inadi**, 475 U.S. 387 (1986), and without a showing of independent indicia of reliability of such statement (**Bourjaily v. United States**, 107 S.Ct. 2775 (1987)). Since the Court has relaxed the standard for admissibility of evidence, there would be a greater need to insure the enforcement of the review standard of proof of guilt beyond a reasonable doubt.

commented on the ultimate responsibilities of appellate courts to conduct an independent review of constitutional claims when necessary and stated:

> "We have therefore rejected the contention that a jury finding of obscenity vel non is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern."

Some evidence is not enough. After a note in a law review demonstrated frequency of the slight evidence rule's use in both the Fifth and the Ninth Circuit,[4] in **United States v. Malatesta**, 590 F.2d 1379 (5th Cir. 1979), the Fifth Circuit, in an unanimous **en banc** opinion, prohibited the use of this rule:

> "We are convinced that when the sufficiency of the evidence to support any criminal conviction, including conspiracies, is challenged on appeal the correct standard of review is substantial evidence, it being understood, of course, that the

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[4] Connection defendants to conspiracies: The Slight Evidence Rule and Federal Courts, 64 **Virginia Law Review**, 881 (1978).

> evidence is to be viewed in the light most favorable to the Government.
>
> The slight evidence rule as it is used and applied on appeal in conspiracy cases since 1969 should not have been allowed to worm its way into the jurisprudence of the Fifth Circuit. It is accordingly banished as to all appeals hereafter to be decided by this Court" (**Malatesta, supra**, 590 F.2d at 1382 (Emphasis theirs).

The Fifth Circuit's position on the banishment of the "slight evidence" rule has been unwavering. See **United States v. Glasgow**, 658 F.2d 1036, 1040 (5th Cir. 1981); **United States v. DeSimone**, 660 F.2d 532, 536 (5th Cir. 1981); **United States v. Freeman**, 660 F.2d 1030, 1038 (5th Cir. 1981); **United States v. Escobar**, 674 F.2d 469, 476-77 (5th Cir. 1982); **United States v. Shackelford**, 667 F.2d 422, 426 (5th Cir. 1982); **United States v. Kimble**, 719 F.2d 1253 (5th Cir. 1983). The Eleventh Circuit, which adopted the law of the Fifth Circuit, has continued to cite **Malatesta** for a requirement that there must be substantial evidence to

support the conspiracy conviction. **United States v. Spradlen**, 662 F.2d 724, 727 (11th Cir. 1981); **United States v. Slocum**, 708 F.2d 587, 594 (11th Cir. 1983); **United States v. Deparias**, 805 F.2d 1447 (11th Cir. 1986).

In **United States v. Marsh**, 747 F.2d 7 (1st Cir. 1984), the First Circuit found that there was a conspiracy and that all defendants were participants, but the court was concerned that there was sufficient evidence of a knowing participation by each of the defendants in the conspiracy charged, for such knowledge and intent was a necessary element of the case to be proven beyond a reasonable doubt. The Court of Appeals was troubled by the District Court's reliance on the principle that slight evidence as to the defendant's knowledge of the scheme may be sufficient. 747 F.2d 7, 12. The court recognized the **en banc** banishment of that rule in **Malatesta**, and relied upon a construction of the rule that would clarify that the word

"slight" modifies "connection" and not evidence. Cf **United States v. Dunn**, 564 F.2d 348, 357 (9th Cir. 1977). 747 F.2d 7, 13. The court went out of its way to advise counsel and judges not to take literally such language that,

> "Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect the defendant with it." (Citations from various Circuits).

The court noted,

> "So understood, the slight evidence rule 'would vitiate the Government's ever-present burden of proof, the requirement that guilt must be proved . . . beyond a reasonable doubt. . .." 747 F.2d 7, 13, n 3.

The Ninth Circuit has consistently followed the slight evidence rule since its inception.[5] Application in petitioner's case

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[5] See **United States v. Murray**, 751 F.2d 1528, 1534 (9th Cir. 1985); **United States v. Spetz**, 721 F.2d 1457, 1478 (9th Cir. 1983); **United States v. Ramirez**, 710 F.2d 535, 548 (9th Cir. 1983); **United States v. Brooklier**, 685 F.2d 1208, 1219 (9th Cir. 1982); **U.S. v. Fleishman**, 684 F.2d 1329, 1340-41 (9th Cir. 1982); **United States v. Kenney**, 645 F.2d 1323, 1335 (9th Cir. 1981); **United States v. Jabara**, 618 F.2d 1319, 1328 (9th Cir. 1980); **United States v. Beecroft**, 608 F.2d 753, 757 (9th Cir. 1979); **United States v. Weaver**, 594 F.2d 1272, 1274 (9th Cir. 1979); **United States v.**

is not unique, but it points out a legal "end run" of requirement of proof beyond a reasonable doubt of the defendant's involvement in the conspiracy. In this case, the existence of the conspiracy by the four co-defendants was not disputed. The few innocuous telephone calls of the petitioner arranging for two meetings with Hovsepian, the purchase of the component parts that were assembled by others into a timing device, and the concerns about surveillance does not amount to evidence beyond a reasonable doubt of the petitioner's knowing participation in the conspiracy. The fundamental question is whether the petitioner was a co-conspirator. To apply the "slight evidence" test, is to completely undermine the requirement that direct appellate review should

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Cloughessy, 572 F.2d 190, 191 (9th Cir. 1977); **United States v. Martin**, 567 F.2d 849, 851 (9th Cir. 1977); **United States v. Eddy**, 549 F.2d 108, 111 (9th Cir. 1976); **United States v. Cruz**, 536 F.2d 1264, 1266 (9th Cir. 1976).

require proof beyond a reasonable doubt.[6]

This court needs to clarify the standard of appellate review in conspiracy cases and, at least, abolish the "slight evidence" rule for federal courts.

II. THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL.

The petitioner along with the four named co-defendants was charged that he "knowingly and intentionally transported in interstate commerce certain explosive material with the knowledge and intent that is was to be used to injure and intimidate individuals and that it was to be used to damage or destroy a building, or other real or personal property." (Emphasis added) (CR 2:6). The court gave an aiding and abetting instruction, and the court of appeals

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[6] In **Jackson v. Virginia**, the court required proof beyond a reasonable doubt in federal habeas corpus review of a state conviction. A fortiori, it should be required in direct federal criminal appeals.

affirmed on the aiding and abetting. The petitioner was never involved with the transportation, and the record fails to show any connection of the petitioner with the explosive material, dynamite or blasting caps, or with the assembled explosive device. The petitioner acquired some of the parts ultimately used in the timing device, but there was no evidence showing his involvement either in the assembly of the parts nor that the parts were acquired for such a purpose. That he acquired parts not used support his role as an unknowing participant.

The intentional transportation in interstate commerce is not only the essential element of the offense, but it is <u>also</u> the basis for federal jurisdiction. The evidence of record failed to show any nexus with the transportation or knowledge of the transportation. The evidence of record must support proof beyond a reasonable doubt as to

every essential element of the offense. **Jackson v. Virginia**, 443 U.S. 307 (1979).

The court of appeals held that "scienter as to the interstate transportation element of federal offenses is not ordinarily required." (Appendix A7). This fundamentally misconstrued the specific requirements of this statute that there be a knowing and intentional transportation. This Court needs to respond to the confusion created between the jurisdictional predicate and an expressed element of the offense. Proof of this offense required that the petitioner be aware of the transportation of the explosive. Even construing the evidence most favorably for the Government, the petitioner's purchases, made when accompanied by another, are neutral in themselves and fail to reveal knowledge of their ultimate use in the timing mechanism. The evidence of record failed to show any knowledge of petitioner of the explosive

materials or their transportation.

III. THE WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT.

On the day of trial, 11 February 1986, petitioner's trial counsel filed a motion with the court requesting dismissal for violation of the Speedy Trial Act (STA). The motion was denied and petitioner was ultimately convicted. On appeal, the Court of the Ninth Circuit did not reach the merits of the issue,[7] holding that the motion to dismiss was not properly made to the trial court.

Title 18, U.S.Code §3162(a)(2) states in part,

> Failure of the defendant to move for dismissal prior to trial. . . shall constitute a waiver of the right to

[7] The petitioner contended that 93 non-excludable days had elapsed: 27 days from indictment to the first order excluding time (no such orders had been challanged on appeal), 48 days from the issuance of the mandate on the Government's interlocutory appeal to the Government's filing of a motion for immunity of a witness (Dadaian), and 18 days from the grant of the order of immunity to the day before the jury trial. See Petitioner's Supplemental Brief on Sppedy Trial Act filed in the Court of Appeals.

dismissal under this section.

Here, the clerk's record clearly reflects that voir dire of the jury did not begin until after petitioner filed "Documents Submitted in support of Motion to Dismiss: Speedy Trial Act" (CR 344-345) (emphasis added), thus meeting his pre-trial filing deadline to avoid waiver. At that point, trial was set to begin twenty-three non-excludable days past the seventy-day Speedy Trial Act limit.

Petitioner met the requirement of 18 U.S.Code §3162(a)(2). His motion to dismiss was made prior to the trial commencing. This Court needs to clarify what triggers the responsibility for keeping track of the STA computation: is it the duty of the prosecutor or the courts, or both. The STA affects the entire federal judiciary and may be perceived as an unwanted burden, but this Court should insure that an objection within the scope of the standard set by Congress is honored by

federal courts.

CONCLUSION

Because of the fundamental constitutional questions raised and the standard to assert an objection under the Speedy Trial Act, this Court is requested to issue a writ of certiorari to review petitioner's conviction.

Respectfully submitted,

13 December 1988

John J. Cleary
Attorney for Petitioner,
DIKRAN BERBERIAN

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DIKRAN BERBERIAN, *Defendant-Appellant.*	No. 86-5073 D.C. No. CR 82-917-R-3 OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued December 7, 1987—Pasadena, California
Submitted March 10, 1988*

Filed June 28, 1988

Before: Diarmuid F. O'Scannlain and Edward Leavy,
Circuit Judges, and Samuel P. King**, District Judge.

Opinion by Judge Leavy

*Submission in this case was deferred pending the filing of *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988).

**The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

SUMMARY

Criminal Procedure

Appeal from conviction to bomb and aiding and abetting the transportation of explosive materials. The court affirmed holding that the evidence was sufficient to uphold the convictions.

From intercepted conversations, the FBI learned that appellant Dikran Berberian and others were planning to take violent action against an Honorary Turkish Consulate. Berberian's bomb components were discovered. Berberian's trial was severed from his co-defendants'. He and the government stipulated to excludable time under the Speedy Trial Act. He later filed a motion to withdraw from the stipulation and requested that the court dismiss the case for violation of the Speedy Trial Act. Judge Pfaelzer denied the motion, recused herself, and transferred the case. The trial court denied Berberian's motion to dismiss under the Speedy Trial Act and a jury found him guilty.

[1] The record shows that Berberian was not merely a messenger or unknowing instrument of the conspirators. [2] The evidence was sufficient to establish aiding and abetting in the transportation of the explosive materials. [3] A defendant who seeks dismissal cannot wait until trial to assert a Speedy Trial Act violation. [4] Berberian argues that his oral request for dismissal, made on the first day of his trial, relates back to his Speedy Trial Act motion made before Judge Pfaelzer. However, he includes delay after the interlocutory appeal for the district court's quashing of the government's subpoena of a co-conspirator. Some of this delay occurred more than a year after Judge Pfaelzer denied Berberian's Speedy Trial Act motion. Under such circumstances, he was required to make a new and timely pretrial motion to dismiss under the Speedy Trial Act. [5] Although Berberian objected to Judge Pfaelzer's

reassignment, he did not ask for a random reassignment. Thus, he failed to preserve for appeal any issue with respect to his claim of right to random reassignment under the local rules.

COUNSEL

John J. Cleary, Cleary & Sevilla, San Diego, California, for the defendant-appellant.

Thomas H. Bienert, Jr., Assistant United States Attorney, Criminal Division, Los Angeles, California, for the plaintiff-appellee.

OPINION

LEAVY, Circuit Judge:

Berberian appeals his conviction by a jury of conspiracy to bomb, 18 U.S.C. §§ 371 and 844 (1982), and aiding and abetting transportation of explosive materials, 18 U.S.C. § 844(d) (1982). Berberian contends 1) the evidence was insufficient to support his conspiracy conviction; 2) the evidence was insufficient to support his conviction of aiding and abetting transportation of explosive material; 3) his case should have been dismissed for violation of the Speedy Trial Act, 18 U.S.C. § 3162 (1982); 4) reassignment of his case to Judge Real violated due process and local rules and entitles him to a new trial; 5) the government was required to obtain wiretap authorization under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. §§ 2510-2521 (1986), not under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801-1811 (1982); 6) the district court should have disclosed the government's ex parte in camera submission of classified information. We affirm.

FACTS AND PROCEEDINGS BELOW

In September of 1982 the FBI, as part of an investigation of Armenian terrorist groups, obtained authorization from the United States Foreign Surveillance Court (USFSC) under the Foreign Intelligence Surveillance Act (FISA) to place a wiretap on Viken Hovsepian's telephone in Santa Monica, California. From conversations intercepted by the wiretap, the FBI learned that Berberian, along with Viken Hovsepian, Karnig Sarkissian, Viken Yacoubian, and Steven Dadaian, was a participant in a plan to take violent action against the Honorary Turkish Consulate in Philadelphia.

The FBI's wiretap intercepted four conversations between Berberian and Hovsepian to arrange meetings between the two men. In one conversation, Berberian indicated he did not wish to discuss matters over the telephone; in two of the conversations, the two men spoke in code.

In October of 1982 Berberian purchased a wooden H-block, a circuit tester, and a Timex watch which he delivered to his co-defendants at the Armenian Church. When driving to the church, Berberian circled the blocks as if checking for a tail. Returning home that evening, Berberian parked, then walked to the sidewalk and checked up and down the street.' A few minutes later, he drove away, made a U-turn, and returned home. Forty-five minutes later, he circled the neighborhood in his car as if looking for possible surveillance units.

On October 21, the USFSC authorized continuation of the wiretap because they believed a bomb or components thereof were being transported from Los Angeles to Boston on a Northwest Orient flight on which Dadaian was a passenger. FBI agents ran the luggage accompanying the flight through an x-ray scanner and detected part of a bomb in a suitcase. They opened the suitcase and found all the components necessary for a bomb, including a timing device composed of a

wooden H-block, a circuit tester, and a Timex watch later identified as those purchased by Berberian.

After indictment, Berberian and the other defendants unsuccessfully moved to suppress the evidence from the FISA wiretap and to compel disclosure of an ex parte in camera submission of classified information made by the government. Thereafter, Berberian's trial was severed from his co-defendants'. Berberian and the government stipulated to excludable time under the Speedy Trial Act. Subsequently, the government appealed the court's quashing of the government's subpoena of Dadaian as a witness. This court affirmed the quashing of the subpoena. *United States v. Berberian*, 767 F.2d 1324 (9th Cir. 1985).

Berberian's counsel filed a motion to withdraw from the stipulation concerning excludable time and requested that the court dismiss the case for violation of the Speedy Trial Act. Judge Pfaelzer denied the motion, recused herself, and transferred the case to Judge Real for trial.

On the first day of his trial, Berberian moved to dismiss under the Speedy Trial Act. The trial court denied the motion. The jury found Berberian guilty of conspiracy to bomb and of aiding and abetting transportation of an explosive device. He timely appealed.

DISCUSSION

A. Sufficiency of Evidence of Conspiracy to Bomb

This court will overturn the conspiracy conviction for insufficient evidence only if, after viewing all the evidence in the light most favorable to the government, it appears no rational jury could have found the essential elements of conspiracy beyond a reasonable doubt. *United States v. Disla*, 805 F.2d 1340, 1348 (9th Cir. 1986).

Once existence of a conspiracy has been established, evidence of only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation in it. *United States v. Taylor*, 802 F.2d 1108, 1116 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1809 (1987); *United States v. Hobson*, 519 F.2d 765, 775 (9th Cir.), *cert. denied*, 423 U.S. 931 (1975). Proof of a particular defendant's connection to the conspiracy can be established by circumstantial evidence. *Disla*, 805 F.2d at 1348.

[1] Berberian concedes the existence of a conspiracy, but he argues the evidence shows he was merely a messenger or unknowing instrument of the conspirators. However, the record shows Berberian had four telephone conversations with Hovsepian, was concerned about possible surveillance, and purchased items that were included in the bomb. From such evidence a reasonable jury could have inferred, beyond a reasonable doubt, that Berberian knowingly helped create a bomb which would be used to blow up the Turkish Consulate in Philadelphia.

Berberian also argues that since interstate transportation is an element of the target offense of 18 U.S.C. § 844(d), the government must present proof Berberian knew the bomb would be transported across state lines. That argument lacks merit. The knowing use of interstate facilities is not ordinarily an essential element of substantive offenses of interstate travel. *See, e.g., United States v. Stafford*, 831 F.2d 1479, 1485 & n.8 (9th Cir. 1987) (knowing use of interstate facilities is not part of the mens rea component of a Travel Act offense absent statutory language requiring such intent when there is no congressional purpose that would be furthered by such a requirement and absent unfairness in criminalizing the unknowing use of interstate facilities when the defendant is knowingly engaged in unlawful activity); *United States v. Muza*, 788 F.2d 1309, 1311-12 (8th Cir. 1986) (government did not have to prove a defendant accused of conspiracy to commit arson in violation of 18 U.S.C. § 844(i) had actual knowledge the

tavern was used in interstate commerce because interstate nexus in criminal statutes is most often solely for the purpose of conferring federal jurisdiction); *Hobson*, 519 F.2d at 769 (when defendant accused of conspiring to elude a federal officer in violation of federal law, scienter as to the federal nature of the offense is not required under 18 U.S.C. §§ 371 and 373).

B. Sufficiency of Evidence of Aiding and Abetting the Transportation of the Explosive Material

[2] In reviewing the sufficiency of the evidence that Berberian aided and abetted transportation of an explosive, we view all evidence in the light most favorable to the government to determine if the jury could have found the essential elements of the charge beyond a reasonable doubt. *See Disla*, 805 F.2d at 1348. An abettor's criminal intent may be inferred from attendant facts and circumstances and need not be established by direct evidence. *United States v. Reese*, 775 F.2d 1066, 1072 (9th Cir. 1985).

First, Berberian argues there is no evidence he aided in or knew of the interstate transportation of the bomb. That argument lacks merit. Scienter as to the interstate transportation element of federal offenses is not ordinarily required. *Stafford*, 831 F.2d at 1485 & n.8; *Muza*, 788 F.2d at 1312; *Hobson*, 519 F.2d at 769.

Second, Berberian argues there is no evidence that he aided and abetted in criminal acts concerning "explosive material," as specified in Count II. Berberian reasons his purchase of an H-block, Timex watch, and circuit tester connect him with an "explosive device" but not with "explosive material." That argument lacks merit. Any explosive can be broken down into non-explosive parts; therefore, it is logical to assume explosive material includes all components of a bomb, including a timing device.

C. Speedy Trial Act

[3] We review the district court's disposition of a Speedy Trial Act issue for clear error as to factual findings and de novo as to application of legal standards. *United States v. Henderson*, 746 F.2d 619, 622 (9th Cir. 1984), *aff'd*, 476 U.S. 321 (1986). The parties cannot stipulate to a waiver of the protections of the Speedy Trial Act. *United States v. Pringle*, 751 F.2d 419, 433-34 (1st Cir. 1984). However, a defendant who seeks dismissal cannot wait until trial to assert a Speedy Trial Act violation. The statute provides, "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2).

[4] On appeal, Berberian contends he did not waive his right to dismissal under the Speedy Trial Act. He argues that his oral request for dismissal, made on the first day of his trial, February 11, 1986, relates back to his Speedy Trial Act motion of November 1984 made before Judge Pfaelzer. However, in Berberian's calculations in support of his February 11, 1986 motion, he includes delay after the interlocutory appeal of the district court's quashing of the government's subpoena of a co-conspirator. Some of this delay occurred more than a year after Judge Pfaelzer denied Berberian's 1984 Speedy Trial Act motion. Under such circumstances, Berberian was required to make a new and timely pretrial motion to dismiss under the Speedy Trial Act. Certainly, it is fallacious for Berberian to argue that the nonmeritorious 1984 motion is being "renewed" by his oral motion on the day of his trial. Accordingly, we conclude Berberian waived any right to have his case dismissed under the Speedy Trial Act. We need not reach the merits of his motion.

D. Reassignment to Chief Judge Real

Berberian contends his case should be retried because Judge Pfaelzer's reassignment of the case to Chief Judge Real

violated his right to due process and did not conform to General Order 224 of the Central District of California. Berberian's position lacks merit.

Retrial for violation of local rules on assignment of judges is not warranted unless the defendant can show prejudice. *E.g., United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982) (transfer of a case will not be invalidated on appeal unless the defendant succeeds in showing a pervasive climate of partiality or unfairness due to the transfer); *United States v. Radlick*, 581 F.2d 225, 230 (9th Cir. 1978) (a transfer not in conformity with a local rule is not grounds for reversal when neither appellant was able to demonstrate how he was prejudiced); *United States v. Torbert*, 496 F.2d 154 (9th Cir.), *cert. denied*, 419 U.S. 857 (1974) (unless prejudice by the second judge is manifested at trial, the accused is assumed to have received the fair trial to which due process entitles him).

The reassignment issue arose as a collateral matter to the Speedy Trial issue. Judge Pfaelzer ordered the time from November 10, 1983, to November 6, 1984, excluded under the Speedy Trial Act, finding that, pursuant to 18 U.S.C. § 3161(h)(8)(A), the ends of justice were served by allowing Berberian to sever and have his case tried later from that of his co-defendants. Judge Pfaelzer also ordered excluded the time from August 28, 1984, to September 25, 1984, finding that, pursuant to 18 U.S.C. § 3161(h)(8)(A)(iv), the interests of justice were served by allowing Berberian a continuance necessary to provide him with continuity of counsel. Finally, Judge Pfaelzer ordered the time period between September 25, 1984, and November 6, 1984, excluded pursuant to 18 U.S.C. § 3161(h)(3)(A) and (B) because the government's explosive experts were in Beruit, Lebanon, investigating the bombing of the United States Embassy and were unavailable for trial. Judge Pfaelzer's findings under 18 U.S.C. § 3161 were made pursuant to Berberian's representations in the parties' stipulation as to excludable time that justice would be served if Berberian could sever his case and delay his trial in

order to ensure continuity of counsel, allow Berberian's counsel to narrow the issues for Berberian's trial and concentrate exclusively on the evidence relevant to Berberian's defense, and avoid any prejudice to Berberian that may have resulted from the ongoing trial of the other four co-defendants.

When Berberian's trial counsel requested that Judge Pfaelzer vacate his stipulation and dismiss for violation of the right to a speedy trial, Judge Pfaelzer told trial counsel, "I do feel that you lack integrity." She recused herself stating, "For the reason I have just stated to you, I do not feel that I should sit as a judge in this case and I am going to give it to the Chief Judge." She stated Berberian could go to trial tomorrow with Judge Real. The record does not show the condition of the trial calendar of either judge. We assume Judge Real was ready to try the case even though for other reasons the trial was delayed.

On appeal, Berberian claims the reassignment was punitive and violated due process. However, a litigant takes the risk a judge will rule in a manner consistent with the litigant's request. To the extent Judge Pfaelzer's reassignment was made to protect Berberian's asserted rights under the Speedy Trial Act, he has no basis to complain. Berberian has not shown prejudice nor even argued his trial was in any way unfair. Thus, the reassignment did not violate his right to due process.

[5] When Judge Pfaelzer recused herself and stated she was reassigning to Chief Judge Real, Berberian objected to the reassignment to Judge Real. He did not ask that the case be randomly reassigned by the clerk's office as contemplated by General Order 224. Thus, Berberian did not preserve for appeal any issue with respect to his claim of right to random reassignment under the local rules.

E. FISA Wiretaps and Ex Parte In Camera Material

Berberian contends the FBI's FISA wiretap was illegal and the district court should have disclosed material the govern-

ment submitted to it ex parte and in camera. Berberian adopts the arguments as made in his co-defendants' briefs on these two issues. The Ninth Circuit recently affirmed the district court's decisions on the validity of the FISA wiretap and the propriety of the ex parte in camera submissions. *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988). That opinion is controlling on the FISA and ex parte in camera issues.

The district court is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 86-5073
	D.C. No.CR 82-917-R-3
Plaintiff-Appellee,	
v.	O R D E R
DIKRAN BERBERIAN,	FILED: Nov 2 - 1988
	Cathy A. Catterson,Clerk
Defendant-Appellant.	U.S. Court of Appeals

Before: O'SCANNLAIN, LEAVY, Circuit Judges, and KING[1], District Judge.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Leavy have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

[1] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

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